BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
OSCAR D. AND AGATHA E. SELTZER)

For Appellants: Charles A. McWaters
Certified Public Accountant

For Respondent: Jon Jensen
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Oscar D. and Agatha E. Seltzer against proposed assessments of additional personal income tax in the amounts of $1,831.40 and $1,220.20 for the years 1972 and 1973, respectively.

Agatha E. Seltzer is a party to this appeal solely because she filed joint returns with her husband for the years in issue. Accordingly, only Oscar D. Seltzer will hereinafter be referred to as "appellant."

The issue for determination is whether respondent improperly allocated one-third of appellant's salaries as a corporate executive to California for the years in issue.

Appellant was, during the years in issue, a corporate executive and investor. For the 1972 and 1973 tax years, he reported, on nonresident California tax returns, employee compensation in the amounts of $86,819 and $86,000, respectively. He did not include any portion of this compensation in his California income for either year. Appellant's employee compensation was derived from concurrent employment with three corporations: Roller Derby Skate Corporation of Litchfield, Illinois; West Coast Skate Sales of Paramount, California; and National Skate Board of Paramount, California. Appellant was the majority stockholder of Roller Derby Skate Corporation, organized the other two corporations, and apparently served as an executive for all three corporations.

During 1972 and 1973, appellant was a resident of Oregon; however, he evidently spent portions of each year in this state. On his 1972 California nonresident tax return, appellant indicated that he had been in California for approximately four months.

In June 1975, the Franchise Tax Board (hereinafter "respondent"), having begun an audit of appellant's returns, sent him a questionnaire asking him to state the number of months he had spent in California from 1966 through 1973. Appellant responded by indicating that in 1973 he was in this state for four months and that he had spent no time at all in California in 1972. Given the contradiction between information contained in appellant's 1972 nonresident return and his response to respondent's questionnaire as to the amount of time he had spent in California during that year, respondent requested appellant to reconcile the conflicting statements and also to explain certain aspects of his employment.

Appellant's response to respondent's request for information, as well as subsequent correspondence and conversations between the two parties, failed to

explain either appellant's conflicting statements as to the amount of time he had spent in California in 1972 or the nature of his employment. The issue of appellant's whereabouts in 1972 was later further confused by his statement that he had, in fact, spent approximately five weeks in this state during that year for health and recreational purposes. The record indicates that appellant has never provided respondent with tangible evidence as to the amount of time he spent in California in 1972, even though his accountant suggested that he reconcile the conflicting statements he had given to respondent. There is no dispute as to the fact that appellant spent four months in California in 1973.

The nature of appellant's activities while in California during the years in issue is also disputed. Appellant indicated to respondent, during the course of the audit, that he had conducted business from California by both mail and telephone. Later, he alleged that he had been in this state only for health and recreational purposes. Appellant's accountant, on the other hand, initially advised respondent's auditors that appellant spent only vacation time in California, but later amended his statements to the effect that appellant spent all of his time, both in and out of California, performing executive duties. Subsequently, in a memorandum to this Board, appellant's accountant stated that appellant denied that there was any business purpose attached to his stays in California, but then implied that appellant made occasional business-related telephone calls to his home office while in this state.

Confronted with these discrepancies, respondent determined, on the basis of the contradictory and incomplete statements with which it was furnished, that appellant had spent, as his 1972 nonresident return indicated, four months in California during that year. Respondent further determined that appellant had performed executive functions in this state, during both years in issue, at the same level as he performed elsewhere. Accordingly, respondent issued proposed deficiency assessments for both years, attributing one-third of appellant's employee compensation to California sources. Appellant protested respondent's determinations, but made no attempt to reconcile his previous conflicting statements. Consequently, after an oral hearing and consideration of appellant's protest, respondent affirmed the assessments, resulting in this appeal.

For purposes of the California Personal Income Tax Law, in the case of a nonresident taxpayer, gross income includes only the gross income from sources within this state. (Rev. & Tax. Code, § 17951.) The word "source" conveys the essential idea of origin. The factor which determines the source of income from personal services is the place where the services, are actually performed. Income received for personal services performed in California is income from a California source and is, consequently, taxable by this state. (Appeal of Janice Rule, Cal. St. Bd. of Equal., Oct. 6, 1976; Appeal of Charles W. and Mary D. Perelle, Cal. St. Bd. of Equal., Dec. 17, 1958; Appeal of Robert C. and Marian Thomas, Cal. St. Bd. of Equal., April 20, 1955.)

It is well established that a presumption of correctness attends respondent's determinations as to issues of fact and that appellant has the burden of proving such determinations erroneous. (See, e.g., Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414) (1949); Appeal of Janice Rule, supra; Appeal of Robert L. Webber, Cal. St. Bd. of Equal., Oct. 6, 1976; Appeal of Pearl R. Blattenberger, Cal. St. Bd. of Equal., March 27, 1952.) This presumption is, however, a rebuttable one and will support a finding only in the absence of sufficient evidence to the contrary. (Wiget v. Becker, 84 F.2d 706 (8th Cir. 1936); Appeal of Janice Rule, supra.) Respondent's determination cannot, however, be successfully rebutted when the taxpayer fails to present uncontradicted, credible, competent, and relevant evidence as to the issues in dispute. (Cf. Banks v. Commissioner, 322 F.2d.530 (8th Cir. 1963); Estate of Albert Rand, 28 T.C. 1002 (1957).) To overcome the presumed correctness of respondent's findings as to issues of fact, a taxpayer must introduce credible evidence to support his assertions. When the taxpayer fails to support his assertions with such evidence, respondent's determinations must be upheld. (W. M. Buchanan, 20 B.T.A. 210 (1930); Appeal of James C. and Monablanche A. Walshe, Cal. St. Bd. of Equal., Oct. 20 1975; Appeal of David A. and Barbara L. Beadling, Cal. St. Bd. of Equal., Feb. 3, 1977.)

In the instant 'appeal, appellant has completely failed to offer any objective or tangible evidence as to the two factual issues in question, i.e., the amount of time he spent in California in.1972 and the nature of his activities in this state during the years in issue. Instead, appellant has limited himself to unsupported

assertions as to the ultimate facts in issue here, namely, that he did not spend four months in this state in 1972 and that he did not engage in any business activities while in California. As noted above, assertions of this nature are not sufficient to overcome the presumption of correctness arising from respondent's determinations.

We cannot overlook the fact that appellant is not a person who is ignorant of the methods of business and the purlieus of the law; on the contrary, he was a corporate executive and investor with significant corporate responsibilities. For such an individual to produce tangible evidence showing the actual length of his stay in California and demonstrating that he had not conducted business from this state would not be an insurmountable task. Cancelled checks, hotel receipts, hospital bills, credit card statements, and business, records from the three corporations indicating how they had operated during his stays in California, to name but a few such items, would have constituted the type of tangible evidence needed to support his assertions. His failure or refusal to produce any such documentation, even though represented by an accountant, bears heavily against him. (Appeal of Janice Rule, supra; Halle v. Commissioner, 175 F.2d 500 (2d Cir. 1949), cert. den., 338 U.S. 949 [94 L.Ed. 586] (1950).) Under these circumstances, we must accept as correct respondent's determinations and as proper its decision to allocate one-third of appellant's employee compensation to California for 1972 and 1973.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Oscar D. and Agatha E. Seltzer against proposed assessments of additional personal income tax in the amounts of $1,831.40 and $1,220.20 for the years 1972 and 1973, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 18th day of November, 1980, by the' State Board'of Equalization, with Members Nevins, Reilly, Dronenburg and Bennett present.

Richard Nevins, Chairman

George R. Reilly, Member

Ernest J. Dronenburg; Jr., Member

William M. Bennett, Member

_____, Member